IN THE

Supreme Court of the United States

October Term, 1960

Number

ANDREW CLIFFORD PARK and
JOHN W. VANDIVER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Now comes Andrew Clifford Park and John Walter Vandiver, petitioners in certiorari, and petitions this Honorable Court for the writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

Appellants Andrew Clifford Park and John W. Van-

diver were indicted along with Eugene Whitehead and Fate Thurmond for conspiracy and possessing and selling distilled spirits not bearing internal revenue tax stamps.

Appellants were convicted on both the conspiracy and substantive counts of the indictment, Park receiving a sentence of four (4) years and Vandiver three (3), while Whitehead, who was convicted of the substantive offense alone, received probation and Thurmond was exonerated by a judgment of acquittal by the court.

The indictment alleged the conspiracy existed from May 18th, 1959 until on or about May 23rd, 1959 and contained ten (10) overt acts. The evidence was substantially as follows:

Harry Lauderdale, a Special Agent of the Internal Revenue Service, along with Cliff Ash, an undercover employee of the Government, had been assigned by superior officers to make undercover investigations concerning violations of the internal revenue laws relating to distilled spirits. On May 18th, 1959, both of these men went to the home of Cliff Park in Pendergrass, Georgia. Ash, after being introduced to Park, entered into an agreement concerning the furnishing of liquor by Park at an agreed price, the liquor to be delivered later to Ash in another county. Lauderdale, the government agent, remained in the car while Ash made the arrangements with Park. Lauderdale was identified to Park by Ash as Harry Cotton, a "trip-boy." No money was passed on that occasion, nor was any liquor delivered. Park was to call Ash later by telephone, so as to get all the details of where to make delivery, and the call was to have been made by Park at some telephone outside his home. Two days later on May 20th, Ash received a telephone call

from a person identifying himself as Park, instructing him to meet John Vandiver at a certain location later that day. Ash met Vandiver at the specified location and directed him to the house where the delivery of the whiskey was to be made the next morning. Later that same day Ash went to the home of Park, accompanied by Lauderdale, and paid Park $500.00 in cash. The next morning Vandiver and Whitehead delivered a quantity of whiskey to Lauderdale and Ash at the agreed location.

No evidence was offered by the government tending to prove any existing conspiracy between Park or any other person prior to the entry into the scene by the government agents on May 18th, nor that Park was engaged in such activity at the time of their entry on that date, nor on any prior date.

Lauderdale, the government agent, testified that he was not standing passively by and watching something else going on as much as he was actually instigating it himself, and that the purpose in so doing was to "later prosecute and perhaps convict or send to the penitentiary the victims who he tried to get in the deal." (R. 121)

The jury convicted both appellants Park and Vandiver on both the substantive and conspiracy counts.

The Court of Appeals, in affirming the convictions, held that the agents did not lure and induce the commission of the offense, but merely afforded an opportunity to persons of "ready willingness and complaisance to enter into the unlawful transaction."

A petition for rehearing was filed, pointing out that the Court of Appeals overlooked the contention that government agents formed the original conspiracy them-

selves, and were parties to any subsequent joining of that conspiracy by the appellants, and that the government was therefore estopped from prosecuting the appellants for the conspiracy. The petition for rehearing also pointed out that the Court of Appeals overlooked the case of O'Brien versus United States, 51 Fed. 2nd. 674, from the 7th Circuit, holding to the contrary. The petition for rehearing was denied without further opinion.

JURISDICTION

(a) The judgment of the Court of Appeals was entered on October 21, 1960. A petition for rehearing was denied November 18th, 1960. The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. 1254 (1), and under and by virtue of 18 U.S.C. 3772 and within the time prescribed in Rule XI of the Rules of Practice and Procedure, promulgated May 7, 1934 (292 U.S. 661, 666, 54 S. Ct. XXXIX).

(b) The statute of the United States, the validity of which is involved in this application for certiorari, is as follows:

> "18 U.S.C.A. #371. CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES:
>
> If two or more persons conspire either to commit any offense against the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

(c) This petition for certiorari is being filed in this

Court within 30 days from the date of the judgment denying the petition for rehearing.

(d) The nature of the case and the rulings of the Court were such as to bring the case within the jurisdictional provisions relied upon, and the grounds upon which it is contended that the questions involved are substantial are as follows:

1.

The United States Court of Appeals for the Fifth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court.

2.

The United States Court of Appeals for the Fifth Circuit has rendered this decision in conflict with the decision of the United States Court of Appeals for the Seventh Circuit on the same matter, to-wit: the case of O'Brien versus United States, 51 Fed. 2nd, 674.

3.

The United States Court of Appeals for the Fifth Circuit has decided a question of gravity and importance in the administration of criminal justice involving federal conspiracy prosecutions as it relates to the conviction of persons who enter a conspiracy already formed by federal agents.

THE QUESTIONS PRESENTED

1. Whether the government is estopped from prosecuting a conspiracy to violate the Internal Revenue Laws when the only evidence of the conspiracy is from Govern-

ment agents who themselves had instigated and plotted the alleged conspiracy from its very inception, and were present during the commission of each alleged overt act, aiding and assisting its successful conclusion?

2. Whether there is a distinction between the law of entrapment as it relates to the commission or substantive offenses and an estoppel as it relates to conspiracy offenses, inasmuch as a conspiracy can not be formed by one person alone and all those who join a conspiracy are equally guilty, and where government agents become a party to such an unlawful agreement does that make the government a co-conspirator, estopping them from further prosecution?

3. Is the Government required to show, where the evidence shows they have entrapped defendants into committing a crime, that they had reasonable grounds for suspecting such defendants to have violated federal law before a conviction would be justified?

APPENDIX

Petitioners append hereto a copy of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted.

WESLEY R. ASINOF,
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JACK DAVIDSON,
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Attorneys for Petitioners

Extract from the Minutes of October 21, 1960.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 18,253

D.C. Docket No. 22077 Criminal.

ANDREW CLIFFORD PARK and
JOHN W. VANDIVER,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of Georgia

---

Before JONES, Circuit Judge, and
HOOPER, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 18253

ANDREW CLIFFORD PARK and
JOHN W. VANDIVER,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of Georgia

---

(October 21, 1960.)

Before JONES, Circuit Judge, and
HOOPER, District Judge.

PER CURIAM: The appellants were convicted on two counts of an indictment charging operations in non-tax paid distilled spirits. One count was for a substantive offense and the other for conspiracy. As to the substantive offense, it was claimed as to Park that

although there was evidence that he had undertaken to have the liquor delivered and had received payment for it before it was delivered, there was no evidence that it was ever in his personal custody and the conviction could not be sustained. The position is unsound. If not otherwise subject to conviction Park became so as one aiding and abetting in the commission of the offense. 18 U.S.C.A. § 2.

The principal point urged as a reason for a reversal of the conviction is that the Government agents to whom the liquor was sold entrapped the appellants. The evidence shows that the agents approached the appellant Park and offered to buy liquor from him. Park, after brief negotiations, agreed to make a sale and the price and time and place of delivery were agreed upon. Price was paid for the spirits which were delivered by the appellant Vandiver. The defense of entrapment was not asserted during the trial but the appellants contended that they made no sale and made no delivery of the illicit liquor. Cf. *Rodriguez v. United States*, 5th Cir. 1955, 227 F. 2d 912; *Henderson v. United States*, 5th Cir. 1956, 237 F. 2d 169. However, the court gave a charge on entrapment and later, at the appellants' request, gave another. Where there is a defense of entrapment it is generally a question for the jury. *Kivette v. United States*, 5th Cir. 1956, 230 F. 2d 749. Nothing here established that the agents lured and induced the commission of the offense rather than affording an opportunity to persons of ready willingness and complaisance to enter into the unlawful transaction. This being so,

the appellants were not entitled to an acquittal as a matter of law.

The judgment of the district court is

AFFIRMED.

A true copy
Test:

EDWARD W. WADSWORTH

Clerk, U. S. Court of Appeals, Fifth Circuit

New Orleans, Louisiana

November 30, 1960

Adm. Office, U.S. Courts—E. S. Upton Printing Co., New Orleans, La.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 18253

ANDREW CLIFFORD PARK and
JOHN W. VANDIVER,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of Georgia

---

(November 18, 1960)

ON PETITION FOR REHEARING

Before JONES, Circuit Judge and
HOOPER, District Judge

PER CURIAM:

IT IS ORDERED That the petition for rehearing in the above entitled and numbered cause be, and it is hereby DENIED.

(ORIGINAL FILED: November 18, 1960)

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Office Supreme Court, U.S.
FILED
JAN 12 1961
JAMES R. BROWNING, Clerk

No. 597

In the Supreme Court of the United States

OCTOBER TERM, 1960

ANDREW CLIFFORD PARK AND JOHN W. VANDIVER,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 597

ANDREW CLIFFORD PARK AND JOHN W. VANDIVER,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 9–11) is reported at 283 F. 2d 253.

JURISDICTION

The judgment of the court of appeals was entered on October 21, 1960 (Pet. 7–8). A petition for rehearing was denied on November 18, 1960. The petition for a

writ of certiorari was filed on December 22, 1960.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners were entrapped.

STATEMENT

After a trial by jury, petitioners were found guilty on a two-count indictment charging conspiracy to violate, and a substantive violation of, the liquor laws (R. 2–5, 425). Petitioner Park was sentenced to a term of imprisonment for four years and to pay a fine of $4,000 (R. 426–427). Petitioner Vandiver was sentenced to a term of imprisonment for three years and to pay a fine of $3,000 (R. 427–428).

The pertinent evidence may be summarized as follows:

On May 18, 1958, Special Agent Lauderdale of the Internal Revenue Service and undercover agent Clifford Ash went to the home of petitioner Park in Pendergrass, Georgia. Special Agent Lauderdale remained in the car while Ash went into Park's home. Park agreed to sell whiskey to Ash in carload lots for $25 per case (R. 15–17, 108–109).

About two days later, petitioner Park telephoned Ash at his home and asked him to meet petitioner

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[1] In a letter to the Clerk, petitioner's counsel explained that the petition was mailed on December 9, 1960, but that because of damage to the package by the Post Office Department and delay in the mailing service due to no fault or neglect of petitioner or his counsel, the petition was not received by the Court until December 22, 1960. Accordingly, we raise no issue of timeliness.

Vandiver at a local restaurant to complete the details as to the delivery of the whiskey. At the meeting, Vandiver said he would deliver about twenty cases of whiskey on the following day. Thereafter, Ash went to petitioner Park's home and paid him $500 of government funds (R. 18–21, 110–111).

On the morning of May 21, 1958, petitioner Vandiver delivered twenty cases of non-tax-paid whiskey to Ash's house. Ash told Vandiver that he had paid Park and Vandiver said he knew that (R. 22, 101–102, 113–114). On May 23, petitioner Park telephoned Ash again and told him that Vandiver had made about a hundred cases of alcohol and wanted Ash to buy them. No agreement was reached. A few days later, Vandiver told Ash that his still had been destroyed. There were no further dealings between the government employees and petitioners (R. 23, 115).

Both petitioners took the stand and each denied making any sale of alcohol to the government employees. Petitioner Park said that Ash came to his home presumably looking for a lost truck, that Ash had asked to buy whiskey, and that petitioner refused. Petitioner Vandiver said that he had gone to Ash's house and had agreed to sell Ash some whiskey, but when he saw Lauderdale, whom he recognized as a special federal agent, he refused to go through with the sale (R. 275–276, 278–280, 317–322). Neither of the petitioners claimed entrapment. However, the court on its own motion gave the usual instruction on entrapment (R. 374–375). A further instruction was given at the request of petitioners' counsel (R. 387–388).

ARGUMENT

Although petitioners did not defend on the ground of entrapment at the trial, they now argue that the evidence shows entrapment as a matter of law. They contend that the government induced them to join an existing conspiracy of government agents and that therefore they are not to be held liable for the conspiracy or for substantive acts committed pursuant thereto. There was no such evidence in this case. All that the evidence showed was that the government agents made an offer to buy from petitioners who were more than willing to sell. This, as the jury found, is not entrapment. *Sorrells* v. *United States*, 287 U.S. 435, 441–442; *Masciale* v. *United States*, 356 U.S. 386, 388.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
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JANUARY 1961.

U.S. GOVERNMENT PRINTING OFFICE: 1961